Filed 6/21/10 In re R.S. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re R.S., a Person Coming Under the Juvenile Court Law.	H035027 (Santa Cruz County Super. Ct. No. DP000049)
SANTA CRUZ COUNTY HUMAN SERVICES DEPARTMENT, Plaintiff and Respondent, v. R.S., Defendant and Appellant.	

On appeal, minor R.S. asserts that dependency jurisdiction was improperly terminated after he was declared a ward of the court in separate delinquency proceedings because the dependency court did not determine whether the procedures required by Welfare and Institutions Code[1] section 241.1 had been followed by the delinquency court and, consequently, its termination order was not supported by sufficient evidence. Minor

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

was declared a dependent child of the juvenile court as a young child and retained that status into his teenage years.

Section 241.1 mandates that each county develop a joint "assessment" protocol, which facilitates coordinated assessment of the appropriate jurisdictional status for a minor who appears to come within the description of both section 300 and section 601 or 602. (§ 241.1, subds. (a), (b).) Section 241.1 also permits each county to develop a joint "dual status"' protocol, as specified, that creates a process for designating a minor as a "dual status child," which allows "the child to be simultaneously a dependent child and a ward of the court." (§ 241.1, subd. (e).)[2]

The appellate record before us does not show that a joint "dual status" protocol was in place in Santa Cruz County at any pertinent time in this case. We granted minor's request to take judicial notice of Santa Cruz County's joint protocol for assessment of minors.[3] (Evid. Code, §§ 452, subd. (h), 459, subd. (a).)

In counties that have not adopted a joint "dual status" protocol, the juvenile court presented with a petition potentially creating a dual status issue must decide whether dependency or wardship is the appropriate status for the minor. (§ 241.1, subd. (a); see Cal. Rules of Court, rule 5.512.)[4] We hold that in counties lacking a joint "dual status" protocol, a court already having dependency jurisdiction over a minor is bound by the subsequent decision of a delinquency court acquiring jurisdiction pursuant to section 602 that the minor should be treated as ward rather than as a dependent child, unless that

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[2] Joint "dual status" protocols must provide for either an "on hold" system or a "lead court/lead agency" to prevent "simultaneous or duplicative case management or services provided by both the county probation department and the child welfare services department." (§ 241.1, subd. (e)(5).)

[3] The protocol is entitled "300/600 Joint Protocol (WIC 241.1) Policy and Procedure" and appears to have been jointly approved in December 2007.

[4] All further references to rules are to the California Rules of Court.

decision is overturned on review, and the court presiding over the dependency must terminate dependency jurisdiction.

A. *Procedural History*

A juvenile dependency petition (§ 300, subd. (b)) was filed on behalf of R.S. on April 13 1999. The juvenile court found that the minor's mother was homeless and his presumed father was deceased. It found minor, then five years old, was a person described by section 300, subdivision (b), and sustained the petition. By order filed on June 17, 1999, the court ordered minor removed from the physical custody of his custodial parent and adjudged him a dependent of the court.

Following the six month review hearing, the court continued minor as a dependent child of the court in an out of home placement and continued reunification services to his mother. Following the 12-month review hearing, the court ordered minor continued as a dependent child of the court and terminated reunification services to minor's mother. By order filed on September 12, 2000, the court appointed legal guardians, the paternal grandparents, for minor and continued minor as a dependent child of the court (see § 366.26). Following each post permanency review hearing from 2001 through 2007, the court continued minor as a dependent child of the court and found that legal guardianship continued to be the most appropriate permanent plan for the child.

On February 14, 2008, a supplemental juvenile dependency petition was filed (§ 387), alleging that minor's legal guardian, his paternal grandmother (grandfather had previously died), could no longer provide for the care and supervision of minor, then 14 years of age. According to the guardian, minor and his brother allegedly were involved in drug and alcohol use, were not complying with house rules, were being disrespectful to the caregiver, and were not regularly attending school.

On March 20, 2008, the supplemental petition was sustained. The court continued minor as a dependent child of the court. Following a disposition hearing on April 17,

2008, the court continued minor as a dependent child of the court, found the permanent plan of legal guardianship continued to be appropriate, and determined minor would remain in the guardian's home on specified conditions. By order filed May 23, 2008, the court continued minor as a dependent child of the court and placed him with his guardian under certain conditions as amended and under the supervision of the Human Services Department (HSD).

A notice of hearing, filed on August 29, 2008, specified that a "hearing re status on joint protocol" would be held on October 2, 2008. A handwritten notation indicates the notice was "per Judge Guy," who had been presiding over the dependency. The notice was mailed to both minor and minor's dependency counsel on August 29, 2008.

A memo updating the dependency court with respect to the joint protocol, prepared by the HSD, was filed on October 2, 2008. It indicated that two delinquency petitions had been filed against minor. A petition, filed on May 13, 2008, alleged three misdemeanor counts of criminal misconduct. Minor admitted a misdemeanor violation of Penal Code section 245, subdivision (a)(1), and the other counts were dismissed but considered for disposition. A second petition, filed on August 7, 2008, alleged one misdemeanor count and two felony counts of criminal misconduct. Minor admitted another misdemeanor violation of Penal Code section 245, subdivision (a)(1), and the other counts were dismissed but considered for disposition. The memo directed the court to the joint protocol report with regard to the first petition and to a memo from the Chief Probation Officer with regard to the second petition.

The "241.1 WIC Report," signed by both the HSD and the Juvenile Probation Department and dated August 2008, was apparently prepared for the disposition hearing on the original delinquency petition (case no. J-21608). It contained the statement of minor's dependency counsel. The report concluded: "As this is the minor's first time through the Juvenile Justice System, and he has admitted to one misdemeanor offense,

Probation feels it would be appropriate to place the minor on a grant of six months probation without wardship, and have the minor continue to draw upon the services available through Child Protective Services." The report recommended that minor be placed on six months probation without wardship.

The memo from the Chief Probation Officer to the court, dated August 25, 2008, was apparently prepared in connection with the second delinquency petition arising from an assault occurring on August 6, 2008, which apparently involved gang epithets. It stated: "As Probation has not had an opportunity to work with the minor, and as Probation would like the minor to have the ability to continue to receive services through Child Protective Services, it was determined that the recommendations prepared for the Joint Protocol report were still appropriate," with specified additional recommended conditions.

HSD's October 2008 memo indicated that there had been a delinquency hearing on September 4, 2008 with regard to these admitted charges and minor had been released from detention in juvenile hall.

On October 2, 2008, the court in the dependency proceedings indicated it had read and considered the memo updating the court on the minor's status with respect to the joint protocol. It ordered the family to participate in gang prevention.

A second "241.1 WIC Report," signed by representatives of both the HSD and Juvenile Probation Department and dated March 11, 2009, was apparently prepared for a disposition hearing on March 16, 2009 (case no. J-21608). The report stated that minor had been involved with the probation department since February 21, 2008. It summarized his previous delinquent behavior, including the following: two admitted misdemeanor assaults with a deadly weapon (Pen. Code, § 245, subd. (a)) and an admitted probation violation. He had been placed on probation on September 4, 2008 and again on January 28, 2009. It indicated that, at the hearing on March 16, 2009, there

would be a disposition on an admitted probation violation and an admitted misdemeanor assault at school (Pen. Code, § 243.2, subd. (a)). It contained the recommendation of minor's dependency counsel that minor remain with family and receive consistent services. Despite minor's recent history, the report recommended that R.S. "would best be served by proceeding under the jurisdiction of 300 W & I Code."

At the March 16, 2009 disposition hearing on "B" (§ 777) and "C" (§§ 243.2, subd. (a), 777) in case number J-21608B/C, the court stated that it had read and considered the 10-page joint protocol report and the memo from probation. Minor's delinquency attorney emphasized that the recommendation was that minor remain a dependent, not a ward of the court. The prosecutor advocated making minor a ward in light of the number of new crimes he had committed. The court made a new grant of probation without wardship under section 725, subdivision (a), under specified terms and conditions and specified that minor was to reside in the custody of his legal guardian. The court ordered minor to comply with the orders and directives of Child Protective Services.

The dependency court held a post permanency review hearing on April 2, 2009. By order filed April 3, 2009, the court continued minor as a dependent child of the court and found that legal guardianship continued to be the most appropriate permanent plan for the child. The next post permanency review hearing was set for October 1, 2009.

On May 12, 2009, a disposition hearing was held on "C" (§ 777) and "D" (§§ 777, 12020, subd. (a)(1)) in case number J-21608C/D.[5] Probation Officer Sutter indicated that

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[5] Minor's dependency counsel specified in the notice of appeal that the court orders and reporter's transcripts from the March 16, 2009 and May 12, 2009 delinquency proceedings should be included in the record on appeal. Minor now argues in his reply brief that this court should disregard the May 12, 2009 transcript because it is beyond the scope of appellate review. We see no reason not to take judicial notice of those court records. (Evid. Code, §§ 452, subd. (d), 459.)

a dual status agreement had not yet been worked out. She informed the court that if minor was made a ward of the court, the dependency would end. Minor's attorney confirmed that Santa Cruz County did not yet have a "dual status" protocol and once minor was made a ward, he would no longer be a dependent. She acknowledged that the court had "continued to follow probation's recommendation" that minor receive services through Child Protective Services but minor had not "done well as we know given the new violations" and "now the recommendation is for wardship . . . ." After much discussion, the court stated, "I did have a conversation with Judge Guy and she is prepared to terminate the dependency. She has gone the distance with [R.S.]." The prosecutor reminded the court that on March 16, 2009, minor had been given an opportunity to stay with Child Protective Services. Probation Officer Zubey indicated that any placement made would be "be parallel to what CPS would be doing" and "[t]he only real hammer we have is that if you don't do this, you can go to the hall." The juvenile court declared minor a ward of the court. The court ordered minor to enter and complete the Tyler House Program and ordered placement in the custody of his legal guardian under specified terms and conditions.

A memo to the dependency court from the HSD, filed September 10, 2009, stated that the memo was "to inform the Court that the minor [R.S.] was declared a ward of Juvenile Probation on 05/12/09."

On October 1, 2009, at the time set for post permanency planning review in the dependency proceedings, minor's dependency counsel complained that she had only learned that minor had been made a ward of the court when she received the memo in August. She stated her belief that the wardship was in violation of the joint protocol procedure. She acknowledged, however, the "dual status process" was not yet "up and running." The assistant county counsel stated that once a minor is declared a ward, the dependency court loses jurisdiction and the dependency matter was "dismissed by

operation of law." She indicated that any complaint regarding compliance with section 241.1 had to be raised in the juvenile delinquency court.

The court took the dependency matter off calendar, did not formally terminate the dependency at the hearing, and asked the court reporter to transcribe the proceeding so that Judge Guy could decide whether the matter "should come back on calendar." The court stated, "At this point, I don't believe we have jurisdiction." The minute order, dated October 1, 2009, stated that as a matter of law, the delinquency court had jurisdiction over the minor and dismissed minor as a dependent child of the court. Minor filed a notice of appeal.

B. *Section 241.1*

On appeal, minor asserts that the order dismissing the dependency must be reversed because the court did not find that section 241.1 procedures had been followed. He specifically contends that the minute order does not show "that a joint assessment was prepared by the probation and child welfare departments, that notice was given to the parties and to the juvenile court with concurrent jurisdiction over the child, or that the court specifically determined that the best interests of R.S. and the protection of society require that he be treated as a ward rather than as a dependent." Minor further contends that a joint assessment report should have been provided to the dependency court and all counsel five days before the May 12, 2009 hearing. We are not persuaded the termination of the dependency constituted error.

Before enactment of section 241.1 in 1989 (Stats.1989, c. 1441, § 1, pp. 6412-6413), an appellate court determined in *In re Donald S.* (1988) 206 Cal.App.3d 134, that a juvenile court did not err in terminating minor's dependency status after he had been declared a ward of the court and committed to the California Youth Authority because the minor cannot be designated a person within the provisions of both section 300 and section 602. (*Id*. at p. 138.) It stated: "The reality is that a child may be adjudged a

dependent child and removed from his parents' home, subsequently engage in conduct which causes him to be adjudicated a status offender, and in a deteriorating set of circumstances, finally commit a crime, which provides the basis for his adjudication as a delinquent child. (See *In re Ronald S.* (1977) 69 Cal.App.3d 866, 871 . . . .) In such a scenario, the child passes from the category of dependent (§ 300) to status offender (§ 601) to delinquent (§ 602)." (*Id.* at p. 137.) The appellate court declared: "The risk of interagency conflict between the DCS and the CYA dictates against continuing appellant's dependency status after his commitment to CYA." (*Id.* at p. 138.)

Section 241.1 was enacted to address the problem of potentially conflicting juvenile jurisdiction over a minor. Under section 241.1, the county probation department and the child welfare services department must, pursuant to a jointly developed "assessment" protocol, "initially determine which status will serve the best interests of the minor and the protection of society."[6] (§ 241.1, subds. (a), (b).) The recommendations of both the county probation department and the child welfare services department, applying the joint "assessment" protocol, must be "presented to the juvenile court *with the petition* that is filed on behalf of the minor, and the court shall determine which status is

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[6] Joint "assessment" protocols are intended "to ensure appropriate local coordination in the assessment of a minor" coming within the jurisdiction of both the delinquency and dependency systems and "the development of recommendations by [the county probation and child welfare services] departments for consideration by the juvenile court." (§ 241.1, subd. (b).) These protocols must "require, but not be limited to, consideration of the nature of the referral, the age of the minor, the prior record of the minor's parents for child abuse, the prior record of the minor for out-of-control or delinquent behavior, the parents' cooperation with the minor's school, the minor's functioning at school, the nature of the minor's home environment, and the records of other agencies that have been involved with the minor and his or her family." (*Ibid.*) In addition, the protocols must "contain provisions for resolution of disagreements between the probation and child welfare services departments regarding the need for dependency or ward status and provisions for determining the circumstances under which a new petition should be filed to change the minor's status." (*Ibid.*)

appropriate for the minor." (§ 241.1, subd. (a), italics added.) The juvenile court presented with a new petition potentially giving rise to dual jurisdiction, in this case the court handling the delinquency proceedings, is the court responsible for considering these departments' recommendations and making the decision regarding the appropriate jurisdictional status for the minor. (See *Los Angeles County Dept. of Children and Family Services v. Superior Court* (2001) 87 Cal.App.4th 320, 325 ["Where the potential for dual jurisdiction arises because a second petition is filed regarding a minor already within the juvenile court's jurisdiction, the court presented with the second petition shall make the necessary determination"]; *In re Marcus G.* (1999) 73 Cal.App.4th 1008, 1013 ["it is the juvenile court facing the problem of dual jurisdiction that must determine whether the minor should be treated as a dependent child or a delinquent minor"].)

In *In re Marcus G., supra,* 73 Cal.App.4th 1008, a case relied upon by minor, a referee of the juvenile court dismissed dependency proceedings, on motion of the Department of Human Services, after minor had been declared a ward of the court in delinquency proceedings. (*Id.* at p. 1011.) The appellate court recognized that "[t]he assessment and determination of which status is appropriate for Marcus should have been made by the juvenile court within the delinquency proceeding, not in the dependency proceeding." (*Id.* at p. 1013.) It further stated: "Because the record in the delinquency proceeding is not before us, we have no information on whether the procedures of section 241.1 were followed" and "we do not know that an assessment was made that wardship status rather than dependency status is more appropriate for him." (*Id.* at pp. 1013-1014.) The appellate court reversed the order dismissing the dependency petition and remanded the case to "the juvenile court with directions to determine whether the procedures set forth in section 241.1 were followed" and whether "an assessment was made within the delinquency proceeding that wardship status, rather than dependency status, is appropriate for the minor." (*Id.* at p. 1017.) The appellate court directed the juvenile

court to reinstate its order dismissing the dependency petition if it determined that an assessment in accordance with section 241.1 had been properly made within the delinquency proceeding. (*Ibid*.) If not, the appellate court directed the juvenile court to order "the probation department and the welfare department to comply with the procedures of section 241.1" and to determine itself "whether the minor should be treated as a dependent child or a delinquent minor." (*Ibid*.)

In *Los Angeles County Dept. of Children and Family Services v. Superior Court, supra,* 87 Cal.App.4th 320, another case cited by minor, the DCFS petitioned for an extraordinary writ of mandate directing the delinquency court to vacate its December 4, 2000 order, issued by a referee, that a minor be transported to a facility designed for section 300 children because that facility was inappropriate for the minor who was a dependent child, because of a long pending delinquency petition alleging that she fell within the description of section 602. (*Id*. at pp. 323-324.) The superior court file before the reviewing court indicated that the delinquency court had not yet acted on the section 602 petition or determined how the minor should be treated even though a section 241.1 report had been submitted on May 4, 1999. (*Id*. at pp. 322-323, 326.)

Minor points to the following language in *Los Angeles County Dept. of Children and Family Services v. Superior Court*, *supra*, 87 Cal.App.4th 320, summarizing *Marcus*: "In other words, a specific decision is required from the court as to which type of jurisdiction it will exercise over a minor. Even where the court has actually adjudicated a minor to be a ward of the delinquency court, dependency proceedings may not be dismissed absent such a finding. Merely referring to an earlier adjudication is not enough." (*Id*. at pp. 325-326.) This language is mere dicta in that case. "It is axiomatic, of course, that a decision does not stand for a proposition not considered by the court. [Citation.]" (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 332.)

Minor urges us to follow *Marcus*. *Marcus* conflicted with established principles of appellate review. It is a cardinal rule of appellate review that error must be affirmatively shown. (*Denham v. Superior* Court (1970) 2 Cal.3d 557, 564.) Otherwise, "[i]t is presumed that official duty has been regularly performed." (Evid. Code, § 664.) An appellant has the burden of showing error by an adequate record. (*In re Kathy P.* (1979) 25 Cal.3d 91, 102.) In addition, an appellate court cannot rectify any alleged error of another court in a section 602 proceeding on appeal from an order issued by the dependency court.

As understood in *Marcus*, under the governing statute, it is the juvenile court faced with establishing yet another jurisdiction over a minor that is statutorily authorized to decide the appropriate status. Under the statutory scheme, the juvenile court that already had jurisdiction over the minor might offer informal input into the other court's decision regarding appropriate status but it has no statutory authority to conduct a hearing under section 241.1 or to decide the appropriate status for the minor going forward and it has no power to police the other court. Under section 241.1, any court that already had jurisdiction over the minor is entitled to only notice "of the presentation of the recommendations of the departments."[7] (§ 241.1, subd. (a).)

In any event, *Marcus* is distinguishable. In *Marcus*, there was no indication in the appellate record of the dependency proceedings that a joint assessment had been conducted and recommendations had been presented to the court presiding over the delinquency proceedings. In contrast, the appellate record before us indicates that, before

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[7] Section 241.1, subdivision (a), states in part: "Any other juvenile court having jurisdiction over the minor shall receive notice from the court, within five calendar days, of the presentation of the recommendations of the departments. The notice shall include the name of the judge to whom, or the courtroom to which, the recommendations were presented." Under rule 5.512(h), the court already having jurisdiction over the minor is also entitled to the other court's findings and orders after a joint assessment report hearing.

May 12, 2009, two section 241.1 reports had been prepared and the court had initially sought to follow the joint recommendations by not declaring minor to be a ward.[8] The transcript of the May 12, 2009 delinquency proceedings shows that the court grappled with the appropriate status before deciding to declare minor to be a ward.

Los Angeles County Dept. of Children and Family Services v. Superior Court, supra, 87 Cal.App.4th 320 is also distinguishable. In that case, the appellate court was reviewing the improper transportation order issued by the delinquency court, which was required to decide the appropriate status for the minor since the delinquency proceeding was initiated after the dependency case. It vacated the order and directed the court to determine the minor's status. (*Id*. at pp. 326 -327.)

In this case, minor asserts that "had the required procedures been followed, the record *in the dependency matter* would reflect that copies of the joint assessment report and recommendation were provided to the dependency court and all counsel five days before the May 12, 2009 hearing."[9] (Italics added.) As already noted, the appellate

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[8] Apparently, juvenile courts in delinquency proceedings attempt to avoid improper "dual status" for minors by granting probation without wardship under section 725, subdivision (a), which in effect allows the child welfare services department to act as the lead agency.

[9] Section 241.1 requires "presentation of the recommendations of the departments" but does not require any evidentiary hearing to be held. (See § 241, subd. (a); *In re Henry S.* (2006) 140 Cal.App.4th 248, 257.) Rule 5.512 (a)(4), provides: "If a petition has been filed, *on the request* of the child, parent, guardian, or counsel, or on the court's own motion, the court *may* set a hearing for a determination under section 241.1 and order that the joint assessment report be made available as required in (f)." (Italics added.) Rule 5.512(e) states with regard to the timing of a hearing: "If the child is detained, the hearing on the joint assessment report must occur as soon as possible after or concurrent with the detention hearing, but no later than 15 court days after the order of detention and before the jurisdictional hearing. If the child is not detained, the hearing on the joint assessment must occur before the jurisdictional hearing and within 30 days of the date of the petition. The juvenile court must conduct the hearing and determine which type of jurisdiction over the child best meets the child's unique circumstances." Rule 5.512(f) states: "At least 5 calendar days before the hearing, notice of the hearing

record contains an August 2008 joint assessment report and a March 2009 joint assessment report, which was considered by the delinquency court in ordering its disposition on March 16, 2009. Insofar as minor is contending that section 241.1 required a new joint assessment report to be presented to the delinquency court before he could be adjudged a ward of the court, the appellate record before us does not make clear that the delinquency court was considering a disposition on a new section 602 petition on May 12, 2009.

The underlying notices of probation violation or petitions in the delinquency proceedings are not part of the appellate record before us. We see nothing in section 241.1 requiring an additional joint assessment report to be filed in response to a section 777 notice. In addition, since a complete court record in the delinquency proceedings is not before us, we do not know whether additional reports or memos were before the delinquency court on May 12, 2009.

Minor argues that his dependency "counsel had no opportunity to confer with the minor's delinquency attorney before the May hearing or to persuade counsel of the merit of her view that dependency should be continued." While it may be beneficial for a minor's dependency and delinquency attorneys to confer, minor does not cite any legal authority establishing a right to confer before status is decided.

As minor asserts, Santa Cruz County's joint "assessment" protocol does require the joint assessment and recommendation to be distributed to a number of recipients, including the minor's section 300 attorney. Whether or not dependency counsel received

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and copies of the joint assessment report must be provided to the child, the child's parent or guardian, all attorneys of record, any CASA volunteer, and any other juvenile court having jurisdiction over the child. The notice must be directed to the judicial officer or department that will conduct the hearing." Rule 5.512(h) provides that "[w]ithin 5 calendar days after the hearing, the clerk of the juvenile court must transmit the court's findings and orders to any other juvenile court with current jurisdiction over the child."

all joint assessments and recommendations in accordance with the protocol is a matter outside the appellate record and beyond the scope of our review.

Any claim that section 241.1 was not properly followed should have been raised on appeal from the order adjudging minor to be a ward of the court (see *In re Henry S.*, *supra*, 140 Cal.App.4th at p. 256), which would have permitted the appellate court to see a complete record of the proceedings. Of course, minor's counsel in the delinquency proceedings was free to seek extraordinary relief if necessary to enforce the provisions of section 241.1.

Once minor was adjudged a ward of the court in the delinquency proceedings, the dependency had to be terminated to avoid improper dual status. (See *In re Donald S.*, *supra*, 206 Cal.App.3d at p. 138.) Section 241.1, subdivision (d), specifically provides that, except as authorized under a joint "dual status" protocol, "nothing in this section shall be construed to authorize . . . the entry of an order by the juvenile court, to make a minor simultaneously both a dependent child and a ward of the court." Subdivision (e) of section 241.1, states correspondingly: "No juvenile court may order that a child is simultaneously a dependent child and a ward of the court pursuant to this subdivision unless and until the required [joint "dual status"] protocol has been created and entered into."

Nothing precludes the filing of a new dependency petition, if appropriate, once Santa Cruz County has a joint "dual status" protocol in place.

The October 1, 2009 order terminating the dependency is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.

In re R. S., a minor

H035027